

JAN 25 1983

No. 82-1080

Alexander L. Stevas, Clerk

IN THE
Supreme Court of the United States

October Term, 1982

TED SIMON, et al.

v.

WILLIAM R. DAVIS, Secretary of the Commonwealth of
Pennsylvania and **RICHARD THORNBURGH**, Governor of
the Commonwealth of Pennsylvania.

On Appeal From the United States District Court for the
Middle District of Pennsylvania.

**MOTION TO DISMISS OR AFFIRM OF APPELLEES HON.
JOSEPH M. McDADE, HON. LAWRENCE COUGHLIN,
HON. GUS YATRON, HON. BUD SHUSTER, HON. WIL-
LIAM F. GOODLING, HON. ROBERT S. WALKER, HON.
WILLIAM F. CLINGER, JR., HON. DONALD L. RITTER,
HON. JAMES K. COYNE, HON. THOMAS M. FOGLIETTA,
HON. EUGENE V. ATKINSON, AND HON. AUSTIN J.
MURPHY.**

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January 24, 1983

COUNTER-STATEMENT OF QUESTIONS PRESENTED

1. Whether the 1982 Pennsylvania congressional districts reapportionment statute, Act 42 of 1982, complies with the requirement of Article I, section 2 of the Constitution of the United States.

2. Whether Act 42 of 1982 violates rights protected by the First or Fourteenth amendments to the Constitution of the United States.

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MOTION TO DISMISS OR AFFIRM

Appellees Hon. Joseph M. McDade, Hon. Lawrence Coughlin, Hon. Gus Yatron, Hon. Bud Shuster, Hon. William F. Goodling, Hon. Robert S. Walker, Hon. William F. Clinger, Jr., Hon. Donald L. Ritter, Hon. James K. Coyne, Hon. Thomas M. Foglietta, Hon. Eugene V. Atkinson, and Hon. Austin J. Murphy, all of whom were incumbent members of the United States House of Representatives when this litigation was begun in 1982,¹ respectfully move to dismiss, or to affirm the judgment of the United States District Court for the Middle District of Pennsylvania in this case. Rule 16(1)(a), (c), and (d).

1. All of the appellees but Eugene V. Atkinson and James K. Coyne were reelected to Congress in November, 1982.

CONSTITUTIONAL PROVISIONS AND THE STATUTE INVOLVED

Article I, section 2 of the Constitution of the United States in pertinent part:

The House of Representatives shall be composed of Members chosen every second Year by the People of the several States, and the Electors in each State shall have the Qualifications requisite for Electors of the most numerous Branch of the State Legislature.

Representatives and direct Taxes shall be apportioned among the several States which may be included within this Union, according to their respective Numbers . . .

Amendment I of the Constitution of the United States:

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

Amendment XIV, section 1 of the Constitution of the United States:

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

The Pennsylvania congressional districts reapportionment statute, Act 42 of 1982, Pa. Stat. Ann. tit. 25 § 3571 (Purdon Legislative Service), is set forth as Appendix D to the Jurisdictional Statement.

COUNTER-STATEMENT OF THE CASE

In 1981, the Governor of Pennsylvania was advised by the President that, as a result of the 1980 census, Pennsylvania was entitled to 23 seats in Congress, two seats fewer than it held pursuant to the 1970 census. District Court Opinion, 2a.² Utilizing the official census data transmitted on March 25, 1981,³ the Pennsylvania legislature considered various redistricting plans and ultimately adopted Act 42 of 1982, codified at Pa. Stat. Ann. tit. 25 § 3571 (Purdon Legislative Service). The full text of Act 42 is reproduced as Appendix D to the Jurisdictional Statement.

The legislative debates that culminated in Act 42 recognized that numerical equality of congressional districts, as a constitutional concern, was the "most salient" of the considerations that guided the Pennsylvania General Assembly. District Court Opinion, 5a. The districts established by Act 42 vary in average population by 253 persons. The percentage of deviation between the largest and smallest district is 0.2354%. If the revised census figures received in October are used, the districts vary in average population by 364 persons. The percentage of deviation between the largest and smallest districts is 0.399%. District Court Opinion, 3a-4a. The district court found that, whether the March or October figures are used, the extremely small degree of variance has no statistically relevant effect on relative representation among the districts created by Act 42. District Court Opinion, 17a.

2. The District Court opinion is reproduced as Appendix A to the Jurisdictional Statement and will be cited as "District Court Opinion" to the page in that Appendix.

3. Certain revised census data was transmitted to Pennsylvania in October, 1981. These revisions played no part in the legislative consideration of congressional redistricting plans. See District Court Opinion, 3a.

Of the four groups of plaintiffs that challenged Act 42 in the United States District Court for the Middle District of Pennsylvania, only the Westmoreland County municipal and county government officials have appealed the District Court's order of September 13, 1982, denying the requests for declaratory and injunctive relief and dismissing the complaints. These plaintiffs have contested the division of Westmoreland County into several congressional districts on partisan grounds and also complained that Act 42 did not achieve the numerical equality mandated by Article I, section 2 of the Constitution. District Court Opinion, 7a.

As noted above, the District Court found that Act 42 complied with the requirements of Article I, section 2. The District Court also flatly rejected the Appellants' other attack on Act 42, finding that it had no constitutional basis. District Court Opinion, 23a-24a.

ARGUMENT

Appellees McDade, et al., move to dismiss the appeal, or affirm the judgment of the district court that Act 42 of 1982, the Pennsylvania congressional districts reapportionment statute, is constitutional.

The two district court opinions, reproduced as Appendices A and B to the Jurisdictional Statement, demonstrate that the litigants and the court attended primarily to two claims about Act 42. First, Act 42 was asserted to be a violation of Article I, section 2 of the Constitution as it has been interpreted and applied by this Court in *Wesberry v. Sanders*, 376 U. S. 1 (1964), and its progeny, especially *Kirkpatrick v. Preisler*, 394 U. S. 526 (1969). The second principal claim was that Act 42 purposely minimized or cancelled out the voting potential of black voters. The present Appellants made no claim in the district court with respect to racial discrimination and have not raised that issue on appeal here. With respect to the first claim, that Act 42 has not achieved numerical equality, the Appellants have offered a cursory argument that the district court's decision in this case can only be sustained if *Kirkpatrick v. Preisler*, *supra*, is modified or abandoned. Jurisdictional Statement, 18.

The district court's decision is entirely consistent with *Kirkpatrick v. Preisler*, which requires the state to "make a good faith effort to achieve precise mathematical equality" in designing congressional districts. *Id.* at 530-31. The district court found that a certain degree of population variance among congressional districts has no statistically relevant effect on relative representation. District Court Opinion, 17a. This conclusion rests, in large part, on the sensible perception that the census figures upon which redistricting is based "are inherently less than absolutely accurate. Those who know about such things recognize this fact, and, unless they are to be wholly ig-

nored, it makes little sense to conclude from relatively minor 'census population' variations among legislative districts that any person's vote is being substantially diluted." *Gaffney v. Cummings*, 412 U. S. 735, 745-46 (1973), quoted at District Court Opinion, 12a-13a. The district court, while not making a finding as to the precise error in the 1980 census figures, accepted it to be at least one percent. District Court Opinion, 13a. The district court also echoed this Court's statement in *Gaffney v. Cummings* that the "census is more of an event than a process. It measures population at only a single instant in time. District populations are constantly changing" *Id.* at 746, quoted at District Court Opinion, 13a.

With respect to the degree of population variance among the districts created by Act 42, the district court was also guided by decisions in the litigation challenging the congressional redistricting plan adopted in New Jersey, *Daggett v. Kimmelman*, 535 F. Supp. 978 (D. N. J.), *stay denied sub nom. Karcher v. Daggett*, — U. S. —, 102 S. Ct. 1298, *probable jurisdiction noted*, — U. S. —, 102 S. Ct. 2955 (1982) (No. 81-2057). In granting a stay from the *Daggett* court's order disapproving the New Jersey plan, Justice Brennan wrote that he saw *Daggett* as "present[ing] the important question whether *Kirkpatrick v. Preisler* requires adoption of the plan that achieves the most precise mathematical exactitude, or whether *Kirkpatrick* left some latitude for the . . . legislature to recognize the considerations taken into account by it as a basis for choosing among several plans, each with arguably 'statistically insignificant' variances from the constitutional ideal of absolute precision." *Karcher v. Daggett*, 102 S. Ct. at 1299. *Daggett* involves a greater percentage of population variation (0.698%) than is present in this case. Justice Brennan saw "a fair prospect" that the decision holding that greater variation unconstitutional would be reversed. *Id.*, 102 S. Ct. 1300.

The district court found that Act 42 was consistent with the mandate of *Kirkpatrick v. Preisler* and sustained its constitutionality. District Court Opinion, 17a. This conclusion represents a sound coordination of the prior decisions of this Court in congressional redistricting cases. The Appellants have not presented any reasons why that conclusion should be disturbed. Further, because this Court will consider in *Daggett* an even greater degree of population variation (0.6984%), requiring the parties in this litigation to prepare briefs and present oral argument would under the circumstances be superfluous. Rule 16(1)(d).

The heart of the Appellants' presentation to this court is an argument that Act 42's division of Westmoreland County among several congressional districts is constitutionally impermissible "gerrymandering." The Appellants would prefer to have "the advantages of a single congressman who would be sensitive to their needs." District Court Opinion, 22a. While stating that Westmoreland County was "the victim of gerrymandering," the district court found that splitting the county among different districts did not "amount to a constitutional violation." District Court Opinion, 23a. As the district court noted, this Court has often reminded the federal courts that "districting inevitably has sharp political impact and inevitably political decisions must be made by those charged with the task." *White v. Weiser*, 412 U. S. 783, 796 (1973); see also, *Gaffney v. Cummings*, *supra*, 412 U. S. at 753. Indeed, Appellants "do not dispute that political considerations are an integral part of redistricting." Jurisdictional Statement, 7. The Appellants also acknowledge that this Court has never established a constitutional limit on the extent to which political considerations can shape redistricting decisions, so long as numerically and racially equal districts result from the political process. *Id.*

The district court refused to remedy the complaints of the Westmoreland County plaintiffs "under the guise of finding constitutional deficiencies where none exist." It advised them that their remedy "lies in the ballot box, not in the federal court house." District Court Opinion, 24a.

Despite the district court's refusal to find that any constitutional violations were caused by the division of Westmoreland County among several congressional districts, the Appellants have advanced several theories in support of their argument that this division violates Article I, section 2, and the First and Fourteenth Amendments to the Constitution. It is their first contention that the division of Westmoreland County among several congressional districts impaired their right to vote. Jurisdictional Statement, 11. No explanation is offered how the subdivision of the County affects that right; in fact, most of the individual plaintiffs are members of the political party presumptively benefited by the "gerrymander."⁴ Jurisdictional Statement, 9. Since an impact on party voting power is an acknowledged result of the reapportionment process, one would expect the Appellants to provide a measurement that would show when the political content of a reapportionment decision becomes constitutionally intolerable. They have not done so nor, it is submitted, can they do so. There is no evidence in the record of this litigation that the voting power of any of the Appellants has been nullified. Whatever the merits of their argument in the abstract, it has no application to this particular case.

The second theory advanced by the Appellants is that certain "natural" or "meaningful" relationships between congressmen and their constituents were disrupted

4. This Court should note that no plaintiff class has been certified and that the Appellants did not sue in any representative capacity. Jurisdictional Statement, ii.

by Act 42. Jurisdictional Statement, 12-13. Since the Constitution protects the relationship between congressmen and their constituents rather than relationships with municipalities, geographic areas, or purported socioeconomic communities, the argument has no constitutional substance. The protection afforded by the First Amendment to the right of people to petition the government for a redress of grievances, cannot convert the desirability of "a meaningful relationship" between legislators and constituents into a constitutional standard. It is a legislative task to evaluate and provide for such meaningful relationships, to determine if they are desirable. This Court has acknowledged the primary jurisdiction of state legislatures in the reapportionment area and directed the federal courts not to intrude their judgment into these areas of policy. See e.g., *White v. Weiser*, *supra*, 412 U. S. at 795.

The third theory advanced by the Appellants is premised on the right to freedom of association protected by the First Amendment. Residence within a county boundary is not the type of "association" that this Court has recognized as deserving First Amendment protection. The associations that have received protection are voluntary associations, not "associations" resulting from an accident of geography. No extrapolation from cases like *Branti v. Finkel*, 445 U. S. 507 (1980); *NAACP v. Button*, 371 U. S. 415 (1963); *Shelton v. Tucker*, 364 U. S. 479 (1960); and *NAACP v. Alabama*, 357 U. S. 449 (1958), can yield a right in residents of a county to a single congressman.

The Appellants complain that the foregoing "important constitutional issues" were never considered by the district court. On the contrary, to the extent they were presented, they were rejected as having no constitutional content. None of them are substantial enough to warrant argument before this Court. Rule 16(1)(c). Alterna-

tively, because none of these latter issues legitimately raise federal constitutional questions, the appeal should be dismissed as to the matters addressed in the Jurisdictional Statement, 7-17, because they are not within this Court's jurisdiction. Rule 16(1)(a).

CONCLUSION

For the foregoing reasons, the appeal in this matter should be dismissed or, alternatively, the district court's decision should be affirmed.

Respectfully submitted,

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